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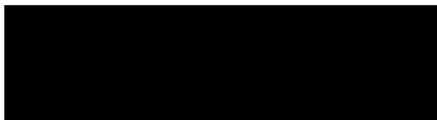
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: SEP 01 2010

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

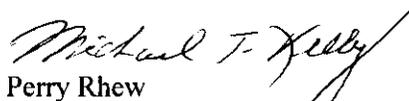


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for 
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of software engineer as an H-1B nonimmigrant in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The petitioner describes itself as a software services and consulting company and indicates that it currently employs 3 persons.

The director denied the petition because the petitioner failed to establish that: (1) it meets the regulatory definition of an intending United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii); (2) it meets the definition of "agent" at 8 C.F.R. § 214.2(h)(2)(i)(F); and (3) the proffered position is a specialty occupation.

On appeal, counsel for the petitioner submits a brief and additional evidence, and contends that the director erroneously found that the petitioner would not be the beneficiary's employer.

When filing the I-129 petition, the petitioner averred in its March 5, 2008 letter of support that it is "a brand new business established in late 2004," and that aside from its shareholders and officers, the beneficiary would be the petitioner's second employee. It claimed that despite being "small and new," it had secured several contracts, and further acknowledged that despite being a sub-contractor, it would maintain complete control over the beneficiary's employment. The petitioner further stated that the beneficiary would be employed in Atlanta, Georgia, and that this location comprised the beneficiary's entire itinerary for the requested period of stay.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on March 18, 2008. Noting that the petitioner was a Michigan based company, the director requested documentary evidence to support the petitioner's claim that the beneficiary would be employed in Atlanta, Georgia. In addition, the director asked the petitioner to submit evidence demonstrating how it would maintain an employee-employer relationship with the beneficiary.

In a response dated March 24, 2008, the petitioner addressed the director's queries. The petitioner included several agreements, including an offer of employment letter; a provider agreement with Chemtech, Inc. (Chemtech); a Statement of Work outlining the beneficiary's services; and a document entitled "Exhibit," which outlined the nature of the consulting services the beneficiary would provide to AT&T, the ultimate end-user of her services.

On April 4, 2008, the director denied the petition. The director found that the petitioner is a contractor that would subcontract the beneficiary to other companies who need computer programming services. The director concluded that, because the petitioner was a contractor, the petitioner was required to demonstrate that it would still supervise and control the beneficiary. The director found that the evidence of record was insufficient to establish that it met the definition of United States employer or agent.

The primary issue in the present matter is whether the petitioner has established that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have

"an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines H-1B nonimmigrants as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . ., who meets the requirements of the occupation specified in section 1184(i)(2) . . ., and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

"United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

Upon review, the AAO concurs with the director's decision. The record is not persuasive in establishing that the petitioner or any of its clients will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations, it is noted that "employee," "employed," "employment," and "employer-employee relationship" are not defined for purposes of the H-1B visa classification even though these terms are used repeatedly in both the Act and the regulations, including within the definition of "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii). Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a labor condition application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Sections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. §§ 1182(n)(1)(A)(i) and 1182(n)(2)(C)(vii). Further, the regulations indicate that "United States employers" must file Form I-129 in order to classify aliens as H-1B temporary "employees." 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the

term "United States employer"). Accordingly, neither the legacy Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer."¹ Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The Supreme Court of the United States has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; see also *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).²

¹ Under 8 C.F.R. §§ 214.2(h)(2)(i)(F), it is possible for an "agent" who will not be the actual "employer" of a beneficiary to file an H petition on behalf of the actual employer and the alien. While an employment agency may petition for the H-1B visa, the ultimate end-user of the alien's services is the "true employer" for H-1B visa purposes, since the end-user will "hire, pay, fire, supervise, or otherwise control the work" of the beneficiary "at the root level." *Defensor v. Meissner*, 201 F.3d 384, 387-8 (5th Cir. 2000). Accordingly, despite the intermediary position of the employment agency, the ultimate employer must still satisfy the requirements of the statute and regulations: "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388.

² While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert.*

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS will focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d at 388 (determining that hospitals, as the recipients of beneficiaries' services, are the true "employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority

denied, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, *and* to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements, thus indicating that the regulations do not indicate an intent to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. See *Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it or any of its clients will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

On appeal, counsel for the petitioner asserts that the director unfairly punished the petitioner for being a small company, and further contended that by virtue of having a supervisor at the end-client location, the petitioner was not automatically disqualified as an employer.

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met. The Form I-129 and the petitioner's tax returns contained in the record indicate that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support and two letters to the beneficiary, both of which are dated December 4, 2007, represent its engagement of the beneficiary to work in the United States, this documentation alone provides no details, beyond the job title, regarding the nature of the job offered or the location(s) where the services will be performed. Therefore, the petitioner has failed to establish that an employer-employee relationship exists.

Despite the director's specific request in the RFE that the petitioner provide evidence demonstrating the nature of its employee-employer relationship with the beneficiary, the petitioner simply submitted documents and contractual agreements without specifying the manner in which they relate to the beneficiary and/or her relationship with the petitioner. The petitioner submitted a copy of its handbook, as well as contracts between the petitioner and Chemtech, identified as the petitioner's "vendor," and agreements between Chemtech and AT&T which outline the beneficiary's services. The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The minimal information contained in the March 5, 2008 letter of support and the incomplete information reflected in the offer letters and various subcontract agreements is insufficient to show that a valid employment agreement or credible offer of employment existed between the petitioner and the beneficiary at the time the petition was filed. While the petitioner submitted a document entitled "Exhibit" between AT&T

and Chemtech, which outlines the duties the beneficiary will perform for AT&T, the petitioner is not mentioned in this document. Most importantly, the petitioner did not submit an employment contract or any other document describing the beneficiary's claimed employment relationship with the petitioner. It has not been established, therefore, that the beneficiary will be "controlled" by the petitioner or that the beneficiary's employment could be terminated. While it is undisputed that the petitioner and Chemtech have a contractual agreement for services, there is no evidence in the record confirming a relationship with AT&T which grants the petitioner the right to hire, fire, supervise, or oversee the beneficiary's employment in any capacity. Thus, the AAO is precluded from concluding that the petitioner would be the beneficiary's employer. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

It should also be noted that there are discrepancies with regard to the offer of employment letters submitted into the record. The petitioner submitted two letters to the beneficiary dated December 4, 2007. Both indicate that the beneficiary will be hired as a software engineer. However, one letter indicates that she will receive \$55,000 in compensation, and the other letter indicates her salary will be \$60,000. The beneficiary executed the letter offering her \$60,000 on December 4, 2007 and signed the letter reducing her salary to \$55,000 (without explanation) on December 5, 2007. This discrepancy is significant, since the LCA lists the prevailing wage for the position of software engineer as \$59,613. No attempt to explain this discrepancy is contained in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Therefore, based on the tests outlined above, the petitioner has not established that it or any of its clients will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

When discussing whether the petitioner was an agent, the director stated that the definition of agent at 8 C.F.R. § 214.2(h)(2)(i)(F) provides for two types of agents: (1) "an agent performing the function of an employer"; and (2) "a company in the business as an agent involving multiple employers as the representative of both the employers and the beneficiary." The director found again that, absent documentation such as work orders or contracts between the ultimate end clients and the beneficiary, the petitioner could not be considered an agent in this matter. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The next issue is whether the beneficiary will be employed in a specialty occupation.

It should be noted that for purposes of the H-1B adjudication, the issue of bona fide employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is viewed as a specialty occupation. Of greater importance to this proceeding, therefore, is whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those of a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R.

§ 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d at 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In addressing whether the proffered position is a specialty occupation, the record contains insufficient evidence as to where and for whom the beneficiary would be performing her services throughout the entire validity period, and whether her services would be that of a software engineer.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.” Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(1) specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

The record’s descriptions of the duties and work to be performed in the proffered position generally comport with the software engineer occupation as discussed in the “Computer Software Engineers and Computer Programmers” chapter of the 2010-2011 edition of the Department of Labor’s *Occupational Outlook Handbook (Handbook)*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. However, as the *Handbook* indicates that that the computer software engineer occupation is not limited to positions that require or are associated with at least a bachelor’s degree, or the equivalent, in a specific specialty, the proffered position’s inclusion within the Computer Software Engineers occupational category is not sufficient to establish that it is or will be a specialty occupation.

The aforementioned chapter of the *Handbook* reports that “most employers prefer applicants who have at least a bachelor's degree, and broad knowledge of, and experience with, a variety of computer systems and technologies.” The *Handbook*, however, does not indicate that computer software engineers constitute an occupational class for which entry normally requires at least a bachelor’s degree or its equivalent in a specific specialty. The following excerpts from the 2010-2011 *Handbook*’s “Computer Software Engineers and Computer Programmers” chapter convey these points:

[From the three introductory “Significant Points”:]

- Job prospects will be best for applicants with a bachelor's or higher degree and relevant experience.

[From the "Training, Other Qualifications, and Advancement" section:]

A bachelor's degree commonly is required for software engineering jobs, although a master's degree is preferred for some positions. A bachelor's degree also is required for many computer programming jobs, although a 2-year degree or certificate may be adequate in some cases. Employers favor applicants who already have relevant skills and experience. Workers who keep up to date with the latest technology usually have good opportunities for advancement.

Education and training. For software engineering positions, most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college majors for applications software engineers are computer science, software engineering, or mathematics. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs.

* * *

Employers who use computers for scientific or engineering applications usually prefer college graduates who have a degree in computer or information science, mathematics, engineering, or the physical sciences. Employers who use computers for business applications prefer to hire people who have had college courses in management information systems and business, and who possess strong programming skills. A graduate degree in a related field is required for some jobs.

In addition to educational attainment, employers highly value relevant programming skills and experience. Students seeking software engineering or programming jobs can enhance their employment opportunities by participating in internships. Some employers, such as large computer and consulting firms, train new employees in intensive, company-based programs.

As technology advances, employers will need workers with the latest skills. To help keep up with changing technology, workers may take continuing education and professional development seminars offered by employers, software vendors, colleges and universities, private training institutions, and professional computing societies. Computer software engineers also need skills related to the industry in which they work. Engineers working for a bank, for example, should have some expertise in finance so that they understand banks' computing needs.

Certification and other qualifications. Certification is a way to demonstrate a level of competence and may provide a jobseeker with a competitive advantage. Certification programs are generally offered by product vendors or software firms, which may require professionals who work with their products to be certified. Voluntary certification also is available through various other organizations, such as professional computing societies.

Computer software engineers and programmers must have strong problem-solving and analytical skills. Ingenuity and creativity are particularly important in order to design new, functional software programs. The ability to work with abstract concepts and to do technical analysis is especially important for systems engineers because they work with the software that controls the computer's operation. Engineers and programmers also must be able to communicate effectively with team members, other staff, and end users. Because they often deal with a number of tasks simultaneously, they must be able to concentrate and pay close attention to detail. Business skills are also important, especially for those wishing to advance to managerial positions.

In light of the fact that the *Handbook's* "Computer Software Engineers and Computer Programmers" chapter indicates that software engineer positions do not categorically require at least a bachelor's degree or its equivalent in a specific specialty, it is incumbent upon the petitioner to provide documentary evidence that establishes that its particular software engineering position is one that requires at least a baccalaureate level of highly specialized knowledge in a specific specialty closely related to the performance requirements of the position, as required by section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and its implementing regulations at 8 C.F.R. §§ 214.2(h)(4)(ii)(defining the term specialty occupation) and 214.2(h)(4)(iii)(A)(detailing additional criteria that must be met to qualify as a specialty occupation). This the petitioner has failed to do.

The petitioner's letter of support dated March 5, 2008 provided a generic overview of the beneficiary's proposed duties. Specifically, the petitioner stated the position would include the following duties:

1. Design, develop, test, analyze, code, implement and maintain computer systems to meet clients' business requirements (approximately 25% of daily work time);
2. Analyze users' requirement and procedures to automate or improve existing database, network and software systems (approximately 15% of daily work time);
3. Perform programming in Java, J2EE, XML and related web technologies based on analysis of clients' business needs and specifications and write test cases using test tools such as Test Director, Black Box, and Systems Regression Testing (approximately 15% of daily work time);
4. Perform Object Oriented design and perform Perl and Shell scripting on UNIX platform (approximately 15% of daily work time);
5. Perform performance tuning, optimization and testing of software and IT systems (approximately 10% of daily work time);
6. Test large ETL warehousing systems and appropriate tools suites using Winrunner/LoadRunner. Develop Automated-testing frameworks with UNIX shell scripting (approximately 10% of daily work time).;
7. Use various computer technologies, languages and environments including C++, Java, XML, HTML, JSP, Tapestry, Struts, Spring, Hibernate, Corba, Eclipse, Ant, Erwin, Rational Rose, Together, UML and others as necessary (Approximately 10% of daily work time).

It is noted that the agreement between Chemtech and AT&T provided substantially the same description of duties.

However, no independent documentation to further explain the nature and scope of these duties was submitted. Noting that the petitioner was engaged in an industry that typically outsourced its personnel to client sites to work on particular projects, the director requested documentation such as contracts and work orders that would outline for whom the beneficiary would render services and what his duties would include at each worksite. While the petitioner submitted the agreements with Chemtech and AT&T, these agreements, as discussed above, outline merely one temporary project upon which the beneficiary would be assigned during his three-year stay.

Upon review of the evidence, the AAO concurs with the director's findings. The job offer letters, both dated December 4, 2007, simply identify the beneficiary's position by the title of software engineer. The agreement between the petitioner and Chemtech makes no mention of the proffered position or scope of the beneficiary's duties. Additionally, while the agreement with Chemtech and AT&T provides the same overview of duties set forth by the petitioner in its March 5, 2008 letter, there is nothing in the record to confirm the relationship between the petitioner and AT&T. Additionally, as previously discussed, this agreement is an at-will agreement and is only guaranteed to be in effect for one year, with the possibility of expansion in six month increments thereafter. Since the petitioner claims to have additional clients, it is clear that the beneficiary's duties could potentially vary widely based on the requirements of a client at any given time. Once again, it is necessary to examine the ultimate end-clients of the petitioner to determine the exact nature and scope of the beneficiary's duties for each client, since it is logical to conclude that the services provided to one client may differ vastly from the services provided to another.

As discussed above, the record contains simply the letter of support which outlines the proposed duties of the beneficiary, and the deficient offer of employment which provides no information regarding the end-clients and their requirements for the beneficiary. Although the record contains the work order for the beneficiary's services with AT&T, there is no evidence in the record to support a finding that these duties will be her duties throughout the entire three-year validity period. Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Moreover, it should be noted that the generalized overview of programming duties is insufficient to properly identify the exact nature of the beneficiary's day to day duties at client sites. Providing a generic job description that speculates what the beneficiary may or may not do at each worksite is insufficient. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” *Id* at 388. The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id*. In *Defensor*, the court found that that evidence of the client companies’ job requirements is critical if the work is to be performed for entities other than the petitioner. *Id*.

In this matter, it remains unclear whether the petitioner will be an employer or will act as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that the beneficiary will be working on client projects and will be assigned to various clients worksites as necessary. Despite the director’s specific request for documentation to establish the ultimate location(s) of the beneficiary’s employment and the manner in which the petitioner would retain control over the beneficiary’s work, the petitioner failed to comply. The petitioner’s failure to provide evidence of an employer-employee relationship and/or work orders or employment contracts between the petitioner and the ultimate end-clients, such as AT&T, renders it impossible to conclude for whom the beneficiary will ultimately provide services and exactly what those services would entail throughout the validity period. While the petitioner provided a generalized description of computer programming duties, there is no specific discussion regarding client needs and the manner in which the beneficiary’s services would have to be adjusted to accommodate such needs at future worksites. The AAO, therefore, cannot analyze whether the beneficiary’s duties at each worksite would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I).

A final issue not addressed by the director is whether the petitioner submitted a valid LCA for all work locations, as required by 8 C.F.R. § 214.2(h)(2)(i)(B). The LCA submitted in support of the petition listed the beneficiary’s work location as Atlanta, Georgia. In reviewing the petitioner’s supporting documentation, however, it appears that the beneficiary may be delegated to other worksites based on the nature of the petitioner’s business operations.

The AAO notes the petitioner’s claim that the beneficiary’s assignment to a worksite in Atlanta, Georgia constitutes her entire itinerary for the requested validity period. However, the AAO also notes that the agreement with AT&T indicates that the agreement is at-will. While the agreement provides for an initial one-year assignment with the possibility for extension in six month increments, this agreement is insufficient to cover the entire three year validity period requested by the petitioner. Moreover, the petitioner acknowledges that it is engaged in the business of contracting employees, and indicates on its website that its clients include AT&T, Chrysler Corporation, IDEXX Laboratories, Michigan Millers Mutual Insurance

Company, and Pfizer, Inc. This is particularly relevant, since the petitioner also claims that the beneficiary is its only employee other than shareholders and officers.

Without ultimate end-client agreements for all potential locations for the beneficiary, the actual work location(s) for the beneficiary during the requested period cannot not be determined. Absent end-agreements with other clients, and upon review of the clause in the AT&T agreement indicating that the beneficiary's employment there is at-will and only guaranteed for one year, the duration and location of work sites to which the beneficiary will be sent during the course of her employment cannot be determined. Absent this evidence, the AAO cannot conclude that the LCA submitted is valid for all of the beneficiary's intended work locations. For this additional reason, the petition may not be approved.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The petition is denied.